IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, *Petitioners,*

v.

LOUISIANA POWER & LIGHT COMPANY, *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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("Cities") contend that such an interpretation of *Goldfarb* is erroneous. The Virginia State bar is an organization of private attorneys that "voluntarily joined in what is essentially a private anti-competitive activity," 421 U.S. at 792. Thus, for the purpose of applying the federal antitrust laws, a critical distinction exists between the Virginia State Bar and the Cities. The Cities submit that they, as municipal governments, are different from bar associations and are not covered by the ruling in *Goldfarb*. LP&L's argument on the merits advances the "other side" of this issue, but does not detract from the importance of the issue, the crying need for resolution of the issue or the arguments presented by the Cities in favor of granting the writ.

LP&L urges that *Goldfarb,* as an intervening decision, minimizes the conflict between the circuits with regard to the application of the federal antitrust laws to cities. If, however, the Court agrees with the Cities that there is a distinction under the state action doctrine [1] between constitutionally created state political subdivisions and bar associations composed of private competing attorneys, LP&L's "boot strap" argument fails, and the direct conflict between the Fifth Circuit here and the Ninth Circuit in *New Mexico* v. *America Petrofina, Inc.,* 501 F. 2d 363 (9th Cir. 1974) remains undiminished.

2. LP&L's Secondary Argument Is Not Germane to the Petition.

In the final few paragraphs of its Brief in Opposition LP&L interjects an extraneous concept into its argument. LP&L makes the claim that the Cities, by providing electric utility services, are engaged in "business for profit," are not functioning as state governmental entities and, therefore, should not be afforded "privileged legal status." [2]

[1] *Parker* v. *Brown,* 317 U.S. 341 (1943).

This argument, the old and discredited proprietary-governmental distinction, which LP&L also advanced below, was summarily rejected by the Fifth Circuit as irrelevant to analysis under *Goldfarb* and *Parker* v. *Brown* (532 F. 2d 431, 434 n. 8, Appendix A to the Petition at p. 6a). Use of the proprietary-governmental distinction in applying federal law was rejected by this Court in *Indian Towing Company* v. *United States,* 350 U.S. 61, 65 (1955) where Mr. Justice Frankfurter warned that the federal courts should not enter into "the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations." The distinction is in any case illusory. "[I]t is hard to think of any governmental activity . . . which is 'uniquely governmental,' in the sense that its kind has not at one time or another been or could not conceivably be, privately performed." 350 U.S. at 68. The concept that municipalities are both part time governments and part time private enterprises tortures reality.

Moreover, LP&L's allegations of "profit-making" by the Cities is an illusion of semantics. The Cities unquestionably are not operated for profit, they are public bodies. Plainly, any surplus revenues received by the Cities, be they as a result of their providing electric services or the collection of traffic fines, merely go to defray other municipal expenses in lieu of additional taxation. There are no shareholders to receive cash dividends, the City officials involved, both

[2] Brief in Opposition at page 18.

elected and appointed, receive no bonuses or stock options and no assertion of LP&L can turn these Cities into private business enterprises which are subject to liability under the federal antitrust laws.

CONCLUSION

The Cities repeat their request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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